



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITH PREJUDICE: March 17, 2011

CBCA 1798

DORACON CONTRACTING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald Lipscomb, President of Doracon Contracting, Inc., Baltimore, MD; and James Vidmar of Logan, Yumkas, Vidmar & Sweeney, Annapolis, MD, appearing for Appellant.

Leonard E. Lucas III, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **DRUMMOND**, and **KULLBERG**.

POLLACK, Board Judge.

This dispute arises between Doracon Contracting, Inc. (Doracon or appellant) of Baltimore, Maryland, and the General Services Administration (GSA), involving contract no. GS-11P-07-YM-C0108. The contract called for design and remediation of the GSA's Central Heating and Refrigeration Plant (CHRP) and West Heating Plant (WHP) oil tank farms located in Washington, D.C.

On November 19, 2009, appellant filed its appeal from a contracting officer's (CO's) final decision, where the CO terminated appellant's contract for default for failure to perform. While the final decision also provided that GSA might purchase the terminated supplies and services against appellant's account and that appellant would be held liable for

any excess costs, the decision did not assess re-procurement costs. After receiving the appeal, the Board issued an order providing various filing deadlines, which included calling for appellant to file a complaint. Appellant complied with that order and on December 21, 2009, submitted its original appeal notice and supporting documentation as its complaint. While not presented in the standard legal complaint format, the Board determined that appellant's filing was susceptible of answer and directed GSA to provide an answer to the filing. In the complaint, appellant not only challenged the default, but also raised dollar claims. On February 14, 2010, the Government filed its answer and as an affirmative defense, GSA stated that all of appellant's claims, except for its wrongful termination claim, should be dismissed for lack of subject matter jurisdiction. GSA pointed out that appellant had failed to comply with the Contract Disputes Act in regard to these claims.

From that point forward, appellant repeatedly failed to diligently pursue the claim and repeatedly failed to communicate with counsel for GSA and with the Board. After several failed telephone attempts to set up a conference, the Board by order dated May 5, 2010, scheduled a conference to be held on May 11, 2010. In the order, the Board reviewed its concerns and the history as to appellant's lack of response and communication.

Appellant reacted positively to the order, and on May 11, 2010, the Board held a telephone conference with Government counsel and the president of appellant, Mr. Ronald Lipscomb. In the conference, Mr. Lipscomb advised the Board that he was in the process of securing counsel. Up to that point, Mr. Lipscomb was operating pro se. So as to allow time for a new counsel to become familiar with the case, the Board directed the parties provide it a schedule by June 11, 2010.

Appellant again failed to meet that deadline and on June 28, 2010, the Board issued another order giving appellant until July 7 to contact GSA counsel as to scheduling. Again, appellant did not reply. Accordingly, the Board issued another order on July 29, 2010, stating that "further difficulties, without explanation, will be viewed unfavorably and may constitute a basis for dismissing for failure to prosecute."

On August 11, 2010, it appeared that matters had changed, and on that date, the Board conducted a telephone conference with counsel for GSA and Mr. James Vidmar, who identified himself as counsel for Doracon. Mr. Vidmar, however, had not filed a formal appearance. In the conference, the Board addressed the issue of the dollar claims and suggested to the parties that while the Board had jurisdiction over the default, it did not have jurisdiction over the dollar claims, which had not been presented to the CO and were not the subject of a CO final decision. The Board proposed a process through which it would hold the termination case in abeyance, allowing appellant to submit its dollar claims and GSA time to consider the claims and issue a final decision, if warranted. The Board directed GSA

counsel and Mr. Vidmar to confer on the above and get back to the Board by September 16, 2010, as to how appellant intended to proceed.

The promise of change, however, did not bear fruit. Appellant again became non-communicative as to GSA counsel and it filed no response by September 16. The Board then issued another order setting a due date of October 15, 2010, for status. When no response was received from appellant or its counsel, the Board, on October 28, 2010, issued an order to show cause. There the Board reviewed appellant's repeated failure to pursue the appeal and provided that absent appellant providing a detailed response and explanation as to how it intended to proceed, the Board would dismiss for failure to prosecute. This order was sent separately to Mr. Vidmar and to Mr. Lipscomb. Appellant was given until November 9, 2010, to respond. The Board received no reply.

On December 14, 2010, the Government filed a motion to dismiss for failure to prosecute. On December 15, 2010, the Board issued an order that gave appellant until January 4, 2011, to respond to the motion. Again the order was sent to both Mr. Vidmar and Mr. Lipscomb. Again, the Board received no response.

Discussion

Dismissing a case for failure to prosecute is a drastic sanction, which is not done lightly. However, if a party fails to pursue its case, as has been the situation in this appeal, and further repeatedly ignores and fails to honor Board directions, then dismissal is clearly warranted. *CCJN & Co., Architects & Planners, P.C. v. General Services Administration*, CBCA 821, et al., 10-1 BCA ¶ 34,420. Appellant's actions in this case justify dismissal with prejudice.

Decision

The appeal is **DISMISSED WITH PREJUDICE**.

HOWARD A. POLLACK
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judg

H. CHUCK KULLBERG
Board Judge